No. 83-535

Supreme Court, U.S.
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In the Supreme Court of the United States

October Term, 1983

MARSHFIELD FAMILY SKATELAND, INC., THOMAS F. VETRA, OCEAN STREET CANTEEN, INC., BONNIE PARKERS, INC., VENUS II, INC., H & M ENTERPRISES, INC., BP PRODUCTIONS, INC., and MARSHFIELD SPORTS CENTER, INC.,

Appellants,

vs.

TOWN OF MARSHFIELD,

Appellee.

On Appeal From The Supreme Judicial Court For The Commonwealth Of Massachusetts

MEMORANDUM IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM

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Appellants respectfully submit this memorandum in reply to appellee's motion to dismiss or affirm.

1. Appellee asserts (M.D. 11-12)[1] that probable jurisdiction should not be noted because the issues presented on

[1] The motion to dismiss or affirm will be referred to herein as "M.D." The jurisdictional statement and the appendix annexed thereto will be referred to as "J.S." and "J.S. App.," respectively.

appeal are "cloudy and imprecise." Appellee's contention rests on the fact that the Supreme Judicial Court affirmed six judgments entered by the Superior Court, and that five of those judgments were entered in cases originally brought under the Marshfield Zoning By-Law, shortly before the effective date of General By-Law No. 48. Appellee contends that this fact should somehow insulate from review the judgment of the Supreme Judicial Court upholding the constitutionality of General By-Law No. 48. That contention, however, is wide of the mark. As we have previously noted (J.S. 4 n.2), no action was brought under the Marshfield Zoning By-Law against appellants Marshfield Family Skateland, Inc. or Marshfield Sports Center, Inc. Their rights were therefore determined in the Superior Court exclusively under General By-Law No. 48. Moreover, the Supreme Judicial Court affirmed all of the judgments on the express ground that they were supported by General By-Law No. 48. As the Supreme Judicial Court explained (J.S. App. 4), "[s]ince we uphold the express prohibition of coin-activated amusement devices under General By-Law No. 48, we need not address the issues raised with regard to the more general provisions of the 1972 zoning by-law." The constitutionality of General By-Law No. 48 is therefore squarely presented.

2. Contrary to appellee's assertion (M.D. 14-15), the record amply supports appellants' description of the video games at issue (J.S. 4-5) as well as appellants' contention (J.S. 12) that "video games are a technologically sophisticated medium through which an author's ideas and fantasies are expressed and communicated to the public." The Statement of Agreed Facts (J.S. App. 40-56), upon which the case was submitted to the Superior Court, describes in detail six video games, including the method of their creation and manufacture (J.S. App. 47-48, 53), the manner in which they are played (J.S. App. 48-49), and

the creative plots which the games communicate (J.S. App. 49-52). In addition, the record includes a videotape demonstration and written explanation of five video games (*see* J.S. 6 n.4).

3. Similarly, there is no merit to appellee's contention (M.D. 15) that video games are not protected by the First Amendment because they are not a "recognized generic form of communications media." The First Amendment clearly affords protection to non-obscene, expressive entertainment, whether the medium be traditional or novel, sophisticated or rudimentary. *See, e.g., Schad* v. *Borough of Mt. Ephraim,* 452 U.S. 61, 65-66 (1981); *Cohen* v. *California,* 403 U.S. 15, 24-26 (1971); *Joseph Burstyn, Inc.* v. *Wilson,* 343 U.S. 495, 501-03 (1952). Finally, appellee's reference (M.D. 10-11) to changing technology lends no support to its contention that the issues presented are unworthy of this Court's attention, but merely serves to underscore the practical importance of this case.

It is respectfully submitted that the motion to dismiss or affirm should be denied and probable jurisdiction noted.

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